86-533

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STUART STEIN,

Respondent,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, BUREAU OF PUPIL TRANSPORTATION, and LEONARD A. DAVID,

Petitioners.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 18, 1986

QUESTIONS PRESENTED

1. Did the Court of Appeals err in reversing and remanding the District Court judgment solely on the issue of nominal damages?

2. When should the issue of nominal damages be presented to the jury in a Section 1983 action?

3. What is sufficient evidence to establish that a deprivation of Constitutionally protected property interests would have occurred regardless of the action of the State?

4. Did the Court of Appeals err in disapproving the District Court's jury instructions on damages?

PARTIES

The appellants before the Court of Appeals for the Second Circuit were the Board of Education of the City of New York, Bureau of Pupil Transportation and Leonard A. David. The appellee was Stuart Stein. Defendants in the District Court A.C.J. Transportation Corp. and Anthony DiDomenico were not parties to the proceedings in the Court of Appeals and have no interest in the outcome of this Cross-Petition for Certiorari.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, Stuart Stein, cross petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered May 22, 1986, which reversed the judgment of the

District Court entered January 24, 1986 and remanded the matter for a new trial on the issue of damages only. In remanding the matter for a new trial, the Court of Appeals found that the factual issue of whether respondent Stein would have been discharged by his private employer regardless of the actions of the Board of Education should have been presented to the jury pursuant to Carey v. Piphus, 435 U.S. 247 (1978).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 792 F.2d 13 (2d Cir. 1986). A copy is annexed as Appendix A. The opinion of the United States District Court for the Eastern District of New York which denied the parties' cross-motions for summary judgment is not reported. A copy is annexed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was dated and entered May 22, 1986. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

This cross-petition has been filed within the time allowed by law, pursuant to Rule 19.5. The petition for certiorari was received by respondent's attorney on August 21, 1986.

CONSTITUTIONAL PROVISIONS AND STATUTES

Section 1 of the Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

(1) Nature of the Case

This action was brought for declaratory and injunctive relief and for money damages by respondent Stuart Stein after his decertification as a school bus driver by the Board of Education and his discharge by his employer, A.C.J. Transportation Corp. ("ACJ"). The complaint asserted causes of action under 42 U.S.C. § 1983 and the Fourteenth Amendment against the petitioners Board of Education and Leonard David for failure to provide Stein with advance written notice of the charges against him, an opportunity to prepare a defense, present witnesses on his behalf and confront his accusers prior to decertification as a bus driver.

Respondent's complaint alleged civil rights conspiracy actions against his employer ACJ and its principal Anthony DiDomenico and a libel claim against defendant DiDomenico.

(2) Course of Proceedings and Disposition in Courts Below

The parties cross-moved for summary judgment and dismissal of the complaint in the District Court (CA 6-33; 34 - 54; 55 - 86).*

By Memorandum and Order dated March 19, 1984 the Honorable Eugene H. Nickerson denied all the motions (App. B-1). A trial by jury was held on September 23, 24, 26, and 30 1985 in the United States District Court, Eastern District of New York, the Honorable Eugene H. Nickerson presiding. The

*References preceded by "CA" are to pages of the Joint Appendix filed with the Court of Appeals; "App" are to the annexed Appendix.

jury's deliberations were bifurcated into liability and damages components.

The jury found, in response to the special interrogatories submitted by the Court, on the issues of liability that:

1. Respondent had not received adequate notice of the charges against him sufficient to enable him to prepare to respond to them (App. C-2);

2. Respondent did not prove that at the hearing of April 12, 1982 he had been denied an explanation of the evidence against him or an opportunity to respond to the charges (App. C-2);

3. Respondent did not prove that DiDomenico libeled Stein in the letter of April 3, 1982 (App. C-2); and

4. Petitioners and defendants failed to prove that all the statements in DiDomenico's letter of April 3, 1982 were true (App. C-3).

After rendering a verdict in

respondent's favor on the issue of liability on his 1983 cause of action, the jury was instructed on the issue of damages.

Petitioners requested that the jury be instructed on the issue of damages that:

> "The only damages which you may award absent a showing of actual injury by a preponderance of the evidence, are nominal damages, not to exceed one dollar." (App. D-4).

The District Court refused to grant the request stating that it was impossible to say what the result would be if respondent was given a proper due process hearing (App. E-3-4).

The jury awarded respondent the sum of $15,000.00 for lost wages and denied any monetary damages for mental and emotional distress suffered as a result of not receiving adequate notice (App.

C-4).

Judgment was entered on January 24, 1986 for the damages awarded by the jury, plus, pursuant to a Stipulation between the parties, $23,000.00 in reasonable attorney's fees, costs and disbursements; and directing that respondent be given a new hearing on written notice to determine whether respondent can drive buses on Board of Education runs (CA. 851 - 52).

Petitioners Board and Leonard David appealed the judgment to the Court of Appeals for the Second Circuit. The Court of Appeals, by judgment entered on May 22, 1986 upheld the finding of liability against the petitioners but reversed and remanded the case solely on the issue of damages based on a finding that the District Court failed to instruct the jury on the issue of whether respondent would have been

discharged by his employer despite the acts of the petitioners. (App. A-25)

(3) Statement of Facts

Stein was hired by defendant A.C.J. Transportation, Inc. ("ACJ") in the fail of 1979 as a bus driver of handicapped children on Board runs (CA. 187 - 189). He was employed pursuant to the terms of the written contract between ACJ and Local 1191 of the Amalgamated Transit Union. The contract provided that he would not be discharged from his employment except for just cause (CA. 181; Exhibit 1 in evidence).

The only business activity engaged in by ACJ is the transportation of handicapped children under contract with the Board (CA. 416). Under the agreement between ACJ and the Board a driver had to be certified and remain certified by the Board in order to drive

a school bus (CA. 741).

Prior to April, 1982, Stein had never been notified by the Bureau of Pupil Transportation regarding any complaints as to his moral character, and ACJ had never received any complaints against him (CA. 442).

On Friday, April 2, 1982, respondent was orally told that he could no longer drive for ACJ (CA. 199).

The next day, Saturday, April 3, 1982, a letter was sent to the Bureau of Pupil Transportation from defendant Anthony DiDomenico (CA. 808) containing numerous hearsay allegations of sexual harrassment against respondent. None of the allegations was based on the personal observations or knowledge of defendant DiDomenico (CA. 437 - 38).

By letter dated Monday, April 5, 1982, matron Maxine Brown wrote a letter to the Bureau of Pupil Transportation

containing allegations of misconduct against Stein (CA. 810).

On or about Thursday, April 8, Stein was orally advised that there was to be a hearing at the office of the Bureau of Pupil Transportation on Monday, April 12, 1982. He was also given a note, with the date and time of the hearing which had been hand written by petitioner Leonard David (CA. 202; 806).

Prior to April 12, 1982, Stein had been given no notice, either oral or written, or the nature of the charges that had been leveled againt him (CA. 61 para. 10).

At the hearing on April 12, 1982, Stein was shown, for the first time, the letters that had been sent to petitioners by ACJ and Maxine Brown (CA. 205).

No one present at the hearing had personal knowledge of the alleged misconduct. None of the matrons or parents who made allegations against respondent were present at the hearing (CA. 204 - 205).

By letter dated April 13, 1982, petitioner David decided to bar Stein from driving Board of Education runs on the grounds that he fell below the standards of "good moral character" described in Section XVII of ACJ's contract with the Board of Education.

Thereafter, respondent Stein's employer, ACJ, discharged him based on the action of the Board of Education in barring Stein from driving Board runs.

An arbitration hearing was held pursuant to the terms of the Union's contract between ACJ and the Union. ACJ claimed its discharge of Stein was a result of the action of the Board of

Education. The arbitrator held that there was no grounds to reverse the employer's decision to discharged Stein based on the action of the Board.

Stein's employer never took any independent steps to discharge or discipline Stein after learning of the allegations lodged against him with the Board and chose to rely on the actions of the Board in discharging respondent.

Stein testified at trial and at the hearing of April 12, 1982 that the allegations contained in the letter from ACJ of April 3, 1982, and Maxine Brown of April 5, 1982, were false and untrue (CA. 210).

At trial respondent presented evidence of last wages as a result of his decertification and loss of employment in the amount of approximately $25,000.00 (CA. 220-230).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in directing a new trial on the sole issue of damages without sufficient evidence that respondent would have lost his job despite the denial of due process is a distortion of and conflicts with the principles set forth by this Court in Carey v. Piphus, supra, and Memphis Community School District v. Stachura, __ U.S. __, 54 U.S.L.W. 4771 (Decided June 25, 1986).

(1)

The Court of Appeals has found that the jury should have determined whether respondent would have been discharged by his employer regardless of the actions of the petitioners. If the jury found that Stein would have lost his job despite the decertification by the petitioners, the jury should have been

instructed to award only nominal damages. (App. A-23-25).

At trial, there was no evidence which purported to establish that respondent would have been discharged by his employer despite his decertification and therefore the factual issue was not one which should have been presented to the jury. Any discharge by the employer would have been subject to review pursuant to the Union contract at an arbitration. It is pure speculation to claim that in this factual situation that respondent would have been terminated by his employer despite petitioners' actions. Furthermore, the jury found that the petitioners and defendants had failed to prove that all the charges against the respondent were true.

In Carey v. Piphus, 435 U.S. 217 (1978) this Court established the

principle that even if a procedural due process deprivation exists, if the deprivation or damages would have occurred anyway, then the party aggrieved would only be entitled to nominal damages.

Carey allows damages to compensate actual injury caused by the Constitutional deprivations, and exemplary or punitive damages to be awarded to deter or punish malicious deprivation of rights. Injury resulting from deprivation of Constitutionally protected rights must be proved and cannot be assumed.

It is crucial to the determination of damages in due process deprivation cases to determine whether the action taken against the aggrieved party was justified, and whether it would have occurred regardless of the fact that a

due process deprivation took place.

Following the reasoning of Carey, this Court in Memphis Community School District v. Stachura, supra, stated that the level of damages is ordinarily determined in accordance with common law principles of tort. Id, __ U.S.__, 54 U.S.L.W. at 4773. Such principles include the need for both parties to come forward with evidence at trial in order to place factual issues before the jury.

In the instant case, Stein's employer did not discharge him due to the allegations of misconduct. Stein's employer took no action regarding discharge until after the petitioner's decertification of Stein. Stein's employer discharged him because of the action of the petitioners' in decertifying Stein.

(2)

In prior cases the Court of Appeals for the Second Circuit correctly applied the principles of Carey. Dwyer v. Regan, 777 F.2d 825 (2d Cir. 1985); In Dwyer the complaint had been dismissed by the District Court and reinstated by the Court of Appeals.

The case was remanded to hear evidence on whether the plaintiff would have been terminated despite the denial of due process. In Dwyer this issue was not previously heard at trial nor had an opportunity to present evidence on such issue been allowed. In applying Carey correctly, the case was remanded to determine this factual question in relation to the issue of damages.

In Strein, there was a trial where petitioners had an opportunity to present evidence to establish that

Stein's injury was not a result of the denial of due process. There was insufficient evidence produced at trial by petitioners to submit the factual issue to the jury of whether Stein would have been discharged by his employer despite the action of petitioners.

Stein's burden of proof was to persuade the jury that he was denied adequate notice, denied a fair hearing and that he suffered actual injuries due to the denial of due process. He was able to carry his burden and established his actual loss of wages.

The burden then shifted to the petitioners to come forward with evidence that Stein would have been fired regardless of the actions of the State, thereby entitling him only to nominal damages. The petitioners were unable to meet such burden and the issue was properly not presented to the jury.

To interpret Carey as requiring the submission of the question of nominal damages to a jury when there is insufficient evidence to support such submission is a distortion of the principles enunciated by this Court.

CONCLUSION

The cross-petition for a writ of certiorari should be granted.

Dated: September 18, 1986

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Stuart Stein

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

Stuart Stein v. The Board of Education of the City of New York, Bureau of Pupil Transportation, A.C.J. Transportation Corp., Anthony DiDomenico, and Leonard A. David.

792 F.2d 13(2d Cir. 1986)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1237--August Term, 1985

Argued April 28, 1986
Decided May 22, 1986

Docket No. 86-7139

STUART STEIN,

Plaintiff-Appellee,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, BUREAU OF PUPIL TRANSPORTATION, A.C.J. TRANSPORTATION CORP., ANTHONY DIDOMENICO, AND LEONARD A. DAVID,

Defendants,

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, LEONARD A. DAVID,

Defendants-Appellants.

Before:

FEINBERG, Chief Judge,
KAUFMAN and OAKES, Circuit Judges.

The Board of Education and Leonard David appeal from judgment entered by United States District Court for the Eastern District of New York (Eugene Nickerson, Judge), after a jury verdict finding a violation of Stein's procedural due process rights.

Reversed and remanded.

FAY S. NG, Corporation Counsel of the City of New York (Frederick A.O. Schwarz, Jr., Corporation Counsel, Ellen B. Fishman, of counsel), for Defendants-Appellants Board of Education and Leonard David.

PAUL A. SHNEYER, Shneyer & Shen, P.C., New York, for Plaintiff-Appellee Stuart Stein.

KAUFMAN, Circuit Judge:

Stuart Stein was employed as a bus driver by A.C.J. Transportation, Inc. ("ACJ") from 1979 to 1982. The exclusive

business of ACJ was to provide bus transportation for handicapped children as directed by the New York City Board of Education.

By the terms of his written contract with ACJ, Stein could not be discharged from his employment except for just cause. A written agreement between ACJ and the Board of Education, however, provided that ACJ "shall only employ persons of good moral character to serve as vehicle operators." Certification that a vehicle operator had received appropriate training was a prerequisite to a driver operating on a Board of Education route. The agreement further provided that, after determination by the Director of the Bureau of Pupil Transportation that a driver's competency "falls below acceptable standards . . . [ACJ], upon receiving written notice from

the Director to that effect, shall not again employ this operator on any part of the work to be performed hereunder, or on any part of the work the contractor may perform for the Board of Education under any other contract."

In early April, 1982, the Chief of Staff at the Bureau of Pupil Transportation of the Board of Education ("Bureau") received anonymous telephone calls reporting that a school bus driver had fondled himself on the bus. The Bureau asked ACJ to investigate the complaints. On April 2, Anthony DiDomenico, the president of ACJ, reported to the Bureau that a chaperone[1] who rode the bus with Stein had complained that Stein

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[1] The chaperones, or "matrons," were women who assisted the handicapped children during the bus rides.

had exposed himself while driving the bus. The Bureau instructed DiDomenico not to allow Stein to drive on Board of Education routes until a hearing could be held. Accordingly, when Stein returned to the ACJ garage that evening after completing his route, he was informed that he would not be permitted to drive for ACJ in the future. No explanation was given.

On April 3, ACJ sent the Bureau a written report containing allegations by several female chaperones that Stein had made sexual advances to them. One of the chaperones, Maxine Brown, sent a letter to the Bureau alleging that Stein had brought women on the bus "who looked very much like prostitutes," and that Stein had asked Brown to buy marijuana for him. Alarmed by these reports, Leonard David, Director of Compliance for the Bureau, decided to

conduct a hearing. David testified that he instructed a member of his staff to send a notice of hearing to ACJ, with a request that a copy of the notice be forwarded to Stein.

The only notice Stein received, however, was a handwritten note from David with the date and the time of the hearing, and verbal instructions from an employee of ACJ to appear at the hearing office of the Bureau on Monday, April 12, 1982.

Stein went to the April 12 meeting with his union representative. For the first time, Stein was shown the letters written by the chaperones, none of whom were present at the hearing. Stein submitted letters attesting to his good character. Nonetheless, the following day, David informed ACJ that Stein was barred from driving on Board of Education routes

because he fell below the standards of "good moral character" required by the contract between the Board of Education and ACJ.

Shortly thereafter Stein was discharged by ACJ. He filed a grievance with his union, and the matter went to arbitration. Both sides submitted evidence, and the arbitrator declined to overturn the decision by ACJ to fire Stein.

On December 22, 1982, Stein brought an action in federal district court pursuant to 42 U.S.C. § 1983, alleging a deprivation of due process because he did not receive adequate notice or a fair hearing before his disqualification by the Board of Education. Leonard David, the New York City Board of Education, ACJ and DiDomenico were named defendants. After a four-day jury trial, Judge Nickerson charged the jury that "Mr. Stein's job is protected by due process of

law," rejecting defendants' request that the jury be instructed that in New York the decertification of a school bus driver is not a constitutionally protected property right. In addition, the district judge denied defense counsel's requested charges that Leonard David might be entitled to a good faith defense, and that the jury should award only nominal damages if it found that Stein would have been discharged by ACJ even if he had received adequate notice.

In response to four special interrogatories, the jury found Stein had not received adequate notice of the charges against him, but that defendants ACJ and DiDomenico did not conspire with the state to deprive Stein of his constitutional rights. Accordingly, it found only defendants Leonard David and the Board of Education liable for lost wages. Judgment was entered

on January 24, 1986, awarding Stein $15,000 in compensatory damages plus attorneys' fees, and directing the Board of Education to hold a new hearing to determine whether Stein should be permitted to drive school buses on Board of Education routes. Leonard David and the Board of Education now appeal.

DISCUSSION

We turn first to the difficult question whether Stein's continued employment by ACJ is a protected property interest such that the state violated his procedural due process rights when it revoked his certification and caused his discharge. The district judge charged the jury that it was.

For reasons which we present below, we agree.[2]

---

[2] In denying defendants' motion for summary judgment on the issue whether Stein had a constitutionally protected property interest, Judge Nickerson relied on the Supreme Court holding in Greene v. McElroy, 360 U.S. 474 (1959). Greene was an engineer who worked for a private contractor on a military installation. After working for the same company for many years, the employee lost his job when the United States Department of Defense revoked the security clearance giving him access to classified documents. The Defense Department had received information that the employee was sympathetic to communism, and on the basis of that information revoked the engineer's security clearance without affording him a hearing. When his employer, having no other choice, was forced to discharge him, Greene was unable to procure employment elsewhere in his field.

The Court, noting that the procedures used to revoke the petitioner's security clearance were not explicitly authorized by the President or Congress, held that the method used to determine petitioner's clearance status did not comport with "traditional ideas of fair procedure." 360 U.S. at 508.

The next year, the Supreme Court (Footnote Continued)

(Footnote Continued)
demonstrated the limited scope of the Greene decision in Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO, et al. v. McElroy, 367 U.S. 886 (1961). In Cafeteria Workers, the petitioner was a cook who worked for a private catering service on a military installation. Like the engineer in Greene, the cook's security clearance was revoked without a hearing. In Cafeteria Workers, however, the Court held that the revocation of the cook's security clearance without a hearing did not violate the Due Process Clause of the Fifth Amendment. The Court noted that Greene had failed to reach the constitutional issue whether an employee had a protected property interest in his security clearance status. Moreover, it found that the explicit Congressional authorization absent in Greene was in fact present in Cafeteria Workers. The Court went on to hold that the petitioner, who had been offered but had refused employment by her company at locations outside the military installation, had been denied only "the right to work at one isolated and specific military installation." 367 U.S. at 896. Accordingly, it found that in light of the Government's important role as proprietor of a military establishment, notice and hearing were not constitutionally required.

Because both Greene and Cafeteria

(Footnote Continued)

(Footnote Continued)
Workers are decisions carefully tailored to their facts, it is difficult to discern which is the rule and which the exception. See Friendly, Some Kind of Hearing, 123 U.Pa.L.Rev. 1263, 1273 (1975). While the majority on Cafeteria Workers believed that fair notice and a hearing were not required when the cook's security clearance was revoked, the Court was strongly influenced by the fact that the cook "remained entirely free to obtain employment as a short-order cook or to get any other job, either with [her present employer] or with any other employer." 367 U.S. at 896. Moreover, the Court found that the revocation of clearance did not "bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity." 367 U.S. at 898.

In these respects Cafeteria Workers differs from the case before us now. Stein's disqualification as a school bus driver for the Board of Education meant that he could not transport students for the Board of Education under the current contract or any other contract ACJ might have with the Board. We have previously held that heightened procedural safeguards are required when a government agency seeks to foreclose further relations with a party, compared to the mere refusal to renew a

(Footnote Continued)

In Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), the Supreme Court wrote:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim to entitlement to it.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or

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(Footnote Continued)
particular contract or set of contracts. Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252, 1259-60 (2d Cir. 1975). Moreover, Stein's disqualification was based upon a written finding that he fell below the standards of "good moral conduct," thereby tainting his chance of obtaining other employment involving the transportation of students. See Birnbaum v. Trussel, 371 F.2d 672, 679 (2d Cir. 1966); Huntley v. Community School Board of Brooklyn, 543 F.2d 979, 984-86 (2d Cir. 1976), cert. denied, 430 U.S. 929 (1977), appeal after remand, 579 F.2d 738 (2d Cir. 1978).

> understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577.

In Roth, the Court held that a nontenured state university teacher holding a one-year appointment did not have a "liberty" or "property" interest in continued employment at the school. In the case before us, however, Stein's contract with ACJ provided that Stein would not be discharged except for "good cause." The "good cause" for the discharge was supplied by the state, which by disqualifying the employee foreclosed him from doing his job. Accordingly, Stein's "claim of entitlement" arose from his contract with ACJ.

We have previously noted that "liberty" or "property" protected by due process need

not always flow from guaranty under state law or the Constitution. Huntley v. Community School Board of Brooklyn, 543 F.2d 979, 986 n.8 (2d Cir. 1976), cert. denied, 430 U.S. 929 (1977), appeal after remand, 579 F.2d 738 (2d Cir. 1978). Where the independent source of a property interest is a private contract, the state cannot transgress on the claim of entitlement to continued employment without due process of law.[3]

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[3] We do not address appellants' contention that had Stein been employed directly by the Board of Education, he would not have a constitutionally protected right in his certification unless he was a civil service employee or his termination was otherwise proscribed by statute or contract. Rather, we simply hold that Stein's contract with ACJ gave rise to a legitimate claim of entitlement to his continued employment, and his disqualification as a certified bus driver by the Board of Education was state action that deprived him of that property.

We need not reach the broad question whether Stein's certification as a vehicle operator by the Board was itself a property interest protected by the constitutional safeguards of due process. Although certification of a driver to work on Board of Education routes might bear some comparison to licensing of professions by the state, see, e.g., Bell v. Burson, 402 U.S. 535, 539 (1971) (suspension of driver's license invokes procedural due process protections when it prevents pursuit of chosen employment); Kenney v. Derbyshire, 718 F.2d 352, 354 (10th Cir. 1983) (medical license is constitutionally protected property right); Herz v. Degnan, 648 F.2d 201, 208 (3d Cir. 1981) (license to practice psychology is constitutionally protected property interest), our holding in this case rests on the narrower ground that Stein had a protected

property interest in his continued employment with ACJ.

The New York case of Morales v. Board of Education, 125 Misc.2d 310 (Sup. Ct. Nassau Co. 1984), comports with our holding. In Morales, a school district decertified a bus driver who worked for a private contractor. The plaintiff, however, continued to work for her employer and could have driven for other school districts with which the company contracted. Here, we hold that Stein's protected property interest lies in his continued employment by ACJ, not in the certification itself. The court's finding in Morales that the plaintiff suffered no deprivation of property because she was not discharged, therefore, does not conflict with our holding.

Having correctly determined that Stein had a protected property interest in his

continued employment, the district judge instructed the jury that due process requires the state to provide adequate notice and a hearing before it expropriates the property of an individual. Accordingly, the jury found that Stein had not received adequate notice of the nature of the charges against him, and awarded Stein $15,000 in compensatory damages against Leonard David and the Board of Education. David contends, however, that the district judge erroneously refused to instruct the jury that they could assess no damages against David if they found him to have acted in good faith in his actions with respect to Stein. We disagree.

Qualified or "good-faith" immunity is an affirmative defense that shields government officials "from liability for civil damages insofar as their conduct does not violate

clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In Harlow, the Court held that in deciding a motion for summary judgment a judge may determine whether the law was clearly established at the time an action occurred, thereby measuring the objective reasonableness of an official's conduct. 457 U.S. at 818. To the extent it eliminated the subjective intent element from the good-faith immunity defense, Harlow implicitly overruled the Court's prior holding in Wood v. Strickland, 420 U.S. 308, 322, reh'g denied, 421 U.S. 921 (1975) (good-faith immunity applies if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if

he took the action with malicious intention to cause a deprivation of constitutional rights or other injury. . . ." (emphasis added)). Accordingly, the Court rejected preliminary holdings that the good-faith immunity defense required a factual injury into whether an official harbored a subjective intent to violate a person's civil rights. See, e.g., O'Connor v. Donaldson, 422 U.S. 563, 577 (1975); Landrum v. Moats, 576 F.2d 1320 (8th Cir. 1978), cert. denied, 439 U.S. 912 (1978); Duchesne v. Sugarman, 566 F.2d 817, 832-33 (2d Cir. 1977).

By omitting the subjective element of the test for "good-faith" immunity, the Supreme Court sought to minimize disruptive judicial inquiries into the motives of government officials exercising discretion in their duties. 457 U.S. at 816-17. Accordingly, whether the law on a particular

issue is clearly established is now a question of law to be determined by the court.

We find, however, that this issue was not properly raised in the district court. In their motion for summary judgment before trial, appellants argued only that David was protected by the doctrine of absolute immunity in his role as a hearing officer--an argument that was rejected by the trial judge and is not raised on appeal. After presentation of all the evidence at trial, appellants requested the judge charge the jury on the good-faith immunity defense. As we have already noted, however, this issue is not appropriate for a jury determination, and the district judge correctly declined to

include it in the jury instructions.[4] David therefore waived his right to raise the good-faith immunity defense.

We now turn to the final issue on appeal, whether the district judge erred by refusing to instruct the jury that only nominal damages were appropriate if they found Stein would have been discharged by ACJ even if he had received proper notice from the school board.

In Carey v. Piphus, 435 U.S. 247 (1978), the Supreme Court held that students who had been suspended from

---

[4] We decline to construe appellants' requested jury charge as an application to the district court for a directed verdict for David based on the good-faith immunity defense. See Mallick v. International Brotherhood of Electrical Workers, 644 F.2d 228, 234 (3d Cir. 1981); Lowenstein v. Pepsi-Cola Bottling Co. of Pennsauken, 536 F.2d 9, 11-12 (3d Cir. 1976).

school without a hearing could receive only nominal damages if the jury found they would have been suspended even if their procedural due process rights had not been violated. The Court stated that a damage award for the suspensions where the failure to accord procedural due process was not the cause of the suspensions would be a windfall to the plaintiffs. 435 U.S. at 260. Acknowledging that mental and emotional distress caused by a denial of due process is compensable pursuant to § 1983, the Court held that proof of such injury nonetheless had to be shown to justify an award of damages. 435 U.S. at 264.

Here, the special verdict delivered by the jury clearly indicated that $15,000 was awarded to Stein to compensate for lost wages because the Board of Education and Leonard David failed to give Stein adequate

notice. The jury did not, nor were they instructed to, determine whether Stein would have been discharged by ACJ regardless of the actions of the state. We recognize that such a determination may involve the taking of additional evidence and create a further imposition on the district court. Nonetheless, we think the Supreme Court's directive in Carey is clear and unequivocal. See Huntley v. Community School Board, 579 F.2d at 740. The district judge, therefore, should have instructed the jury to award only nominal damages if it found Stein would have been discharged by ACJ even had he received adequate notice of his disqualification proceeding from the state.

CONCLUSION

Accordingly, the judgment is reversed and the case remanded to the district court for proceedings consistent with this opinion.[5]

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[5] We believe the issue of nominal damages is "sufficiently distinct from the other issues that a separate trial may be had without injustice." Martell v. Boardwalk Enterprises, Inc., 748 F.2d 740, 756 (2d Cir. 1984). Accordingly, the new trial should be limited to the damages issue. See Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931); Akermanis v. Sea-Land Service, Inc., 688 F.2d 898, 906-07 (2d Cir. 1982), cert. denied, 461 F.2d 927 (1983); Fed.R.Civ.P. 59(a).

APPENDIX B

Memorandum and order of the United States District Court for the Eastern District of New York entered March 20, 1984.

Stuart Stein v. The Board of Education of the City of New York, Bureau of Pupil Transportation, A.C.J. Transportation Corp., Anthony DiDomenico, and Leonard A. David.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

STUART STEIN,

Plaintiff,

-against-

MEMORANDUM AND ORDER
82 C 4117

BOARD OF EDUCATION OF THE CITY OF NEW YORK, BUREAU OF PUPIL TRANSPORTATION, A.C.J. TRANSPORTATION CORP., ANTHONY DIDOMENICO, and LEONARD A. DAVID,

Defendants.

----------x

SHNEYER & STEIN
(Paul A. Schneyer, Esq., of counsel)
New York, New York
for plaintiff

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the
City of New York
(Evelyn Jonas, Esq., of counsel)
New York, New York
for defendants Board of Education and David

FRIEDLANDER, GAINES, COHEN,
ROSENTHAL & ROSENBERG
(Joseph S. Rosenthal, Sara R. Thorne,
Lynne K. Salinger, Esqs., of counsel)

New York, New York
for defendants A.C.J. Transportation Corp.
and DiDomenico

NICKERSON, District Judge

Plaintiff brought this action under 42 U.S.C. §1983 alleging that defendants deprived him of property--his livelihood--without due process of law in violation of the Fourteenth Amendment of the United States Constitution and Article I of the New York State Constitution. He also alleges, in a pendent state claim, that defendant DiDomenico libeled him. Plaintiff seeks reinstatement as a bus driver for defendant A.C.J. Transportation Corp. (A.C.J.), damages for lost wages, punitive damages, and declaratory and injunctive relief.

All of the defendants move, and plaintiff cross-moves, pursuant to Rule 56 for summary judgment.

The facts, as claimed by plaintiff, are as follows. In 1979, A.C.J. hired plaintiff, pursuant to a written contract between A.C.J. and plaintiff's union, as a school bus driver of handicapped children. A.C.J.'s only business is the transportation of handicapped children under a contract with the New York City Board of Education (the Board). The agreement between A.C.J. and the Board provides that before drivers are permitted to operate a school bus they must be certified as meeting the Board's standards, among others, of "good moral character."

On April 2, 1982, A.C.J. told plaintiff that he could no longer work for A.C.J. He was not given the reason.

On April 3, 1982 defendant DiDomenico, the president of A.C.J., drafted a letter, which was signed by a company dispatcher, to defendant Bureau of Pupil Transportation (the Bureau) recounting incidents of sexual harassment by plaintiff allegedly reported by several bus matrons and parents. On April 5, 1982 Maxine Brown, who was assigned to plaintiff's bus as a matron only on the previous March 29, wrote to the Bureau claiming that plaintiff on one occasion had "two women who looked very much like prostitutes" standing in his bus and speaking with him; that on several occasions he fondled himself; and that three times he asked Ms. Brown to purchase marijuana for him.

On April 8, 1982 plaintiff was told by an A.C.J. employee to go to the Bureau offices on April 12. He was given no

further notice, oral or written, of the matters to be discussed. On that date defendant David, the Director of Contract Compliance for the Bureau, held a hearing at which plaintiff was confronted for the first time with the charges contained in DiDomenico's and Brown's letters. None of the complaining matrons or parents was present at the hearing.

In a letter dated April 13, 1982 David delivered his written decision. Relying on the letters, complaints made to him personally outside of the hearing, and plaintiff's demeanor at the hearing, David barred plaintiff from driving on Board routes on the ground that he fell below the standard of "good moral character" described in Section XVII of A.C.J.'s contract with the Board, titled "Vehicle Operator Standards." That section provides that the bus company,

on receiving written notice from the Board that a driver is found to have fallen below the required standards, shall no longer employ that driver on Board routes. Plaintiff was not advised in writing of his right to appeal.

A.C.J. discharged plaintiff, having no work for him other than Board work. The actual date of discharge--April 2 or April 13--is disputed.

Plaintiff filed a grievance through his union under its collective bargaining agreement with A.C.J. Following a hearing at which plaintiff and Brown testified, an arbitrator declined to overturn A.C.J.'s decision to discharge plaintiff.

Plaintiff then brought this action alleging that the charges against him were untrue, that by not giving him advance written notice of the charges against him the

defendants rendered him unable to prepare his defense, and that he was not informed of his rights to be represented by counsel, to present witnesses, and to confront his accusers.

The court will address separately each of defendants' arguments.

I

The Board claims that plaintiff has not alleged the existence of an official Board policy or custom that caused the alleged violation of due process. A municipality cannot be held liable under section 1983 for an action of an employee, here the defendant David, on a theory of respondeat superior. Monell v. Department of Social Services, 436 U.S. 658 (1978). Plaintiff must show that the municipality maintained or practiced an unconstitutional policy or custom and that that policy or custom caused the violation.

Dominguez v. Beame, 603 F.2d 337, 341 (2d Cir. 1979), cert. denied, 446 U.S. 917 (1980).

The court does not accept the Board's argument. Plaintiff directs his challenge at the Board's policy of not providing adequate notice of the hearing. The Board also argues that it hired A.C.J. and not the company's drivers, and that therefore only A.C.J. was responsible to notify plaintiff. However, a private act may give rise to a right to receive procedural due process from a government entity where the consequent deprivation of property results from a government act. An example is where the government's revocation of security clearance results in a discharge from private employment. Greene v. McElroy, 360 U.S. 474 (1959). Here, the contract between A.C.J. and plaintiff's union providing that

plaintiff could not be discharged except for good cause gave him a legitimate expectation that a state action would not cause his discharge without his being afforded due process. Indeed, it would be incongruous for the Board to entertain charges at a hearing on an A.C.J. employee's conduct and to make a decision against him, thereby causing his discharge, and yet not to be responsible for providing to the employee notice of the charge filed with it.

David asserts in his affidavit that he or a clerk from his office sent two copies of written notification to A.C.J., presumably so that one copy would be forwarded to plaintiff. He also believes that the standard notice informs parties of their rights to be represented by counsel. Plaintiff claims to have received no such notice. The court need not address now the question of

whether the notice allegedly sent was adequate to inform plaintiff of the matters at stake.

Plaintiff has stated a claim under section 1983 and has raised triable issues as to what process he was afforded and whether it comported with due process.

II

A.C.J. claims that it was not required to afford procedural due process since the dismissal of plaintiff was a private act, and that its contract with the Board required the dismissal following the Board's determination.

For reasons noted, plaintiff has a section 1983 cause of action against the government defendants. The issue here is whether A.C.J.'s and DiDomenico's actions can be fairly seen as "state action" or as done "under color of state law," so as to make them subject to a suit under section

1983. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982).

The fact that A.C.J.'s business consisted entirely of contracts with the city does not make its acts government acts. Id. at 841. However, A.C.J.'s decision to discharge plaintiff was the direct result of, indeed, was compelled by, a governmental action. See Adickes v. S. H. Kress and Company, 398 U.S. 144, 170-71 (1970). The joint participation here of the Board and A.C.J. in allegedly depriving plaintiff of a property right without due process of law is sufficient to hold A.C.J. See id.; Lugar v. Edmondson Oil Co., 457 U.S. 922, 931 (1982).

For much the same reasons, plaintiff has stated a claim for conspiracy to violate his civil rights. Such a claim must allege with some degree of particularity the acts of

defendants reasonably related to the alleged conspiracy. Chodos v. Federal Bureau of Investigation, 559 F. Supp. 69, 72 (S.D.N.Y.), aff'd, 697 F.2d 289 (2d Cir. 1982). Here plaintiff has clearly enough alleged unlawful acts of cooperation between A.C.J. and the Board resulting in the alleged constitutional deprivation.

III

Defendant David contends that there is no claim against him because his quasi-judicial function as a hearing officer entitled him to absolute immunity from liability for damages. His task was to enforce contracts between the Board and school bus companies, and that included ensuring that vehicle operators met the requisite standards. He had authority to hold hearings on complaints indicating that particular drivers were not of good moral

character, to assess penalties against companies and to bar them from using unsuitable drivers on Board bus routes. He says his position was equivalent to that of a first-level judge.

The question is whether David's functions and the nature of the Board's hearing are such as to require the grant to him of absolute immunity under the standards adopted in Butz v. Economou, 438 U.S. 478 (1978).

Judges are given absolute immunity to assure the performance of their judicial functions "without harassment or intimidation." The nature of their responsibilities rather than their "particular location" is critical. Therefore, in deciding whether a hearing officer should enjoy the same immunity, the court must compare his functions with those of a judge. Id. at 512.

Such an evaluation led the Supreme Court to hold that federal administrative agency hearing examiners are absolutely immune. Id. at 513.

If the Board's hearing held by David provided the requirements of a formal judicial proceeding, he may fairly be said to have assumed a judicial function. These requirements include: (1) a proceeding that is adversary in nature; (2) a hearing officer not subject to the supervision of those engaged in investigative or prosecutorial duties; (3) the opportunity for the accused party to offer evidence on his behalf; (4) a duly recorded record constituting the exclusive record for the decision; and (5) the proceedings structured so as to assure the officer's independent judgment. Ward v. Johnson, 690 F.2d 1098, 1105-06 (4th Cir. 1982) (en banc).

In the Ward case the Fourth Circuit found that the challenged prison disciplinary proceedings were such as to afford the hearing officers absolute immunity. But there exacting guidelines governed the proceedings and ensured the insulation of hearing officers and the granting to inmates the rights to counsel, confrontation and cross-examination of their accusers, and presentation of evidence in their own behalf. 690 F.2d at 1106-08. Other inmate cases have declined to grant such immunity, where such requirements were absent. See, e.g., Hilliard v. Scully, 537 F. Supp. 1084 (S.D.N.Y. 1982). Each situation must be examined individually.

The Board's hearing did not meet the conditions set forth in the Ward case. David states that he held the hearing to "further investigate the various charges." Prior to

the hearing his office received complaints and then asked for written statements. In determining that plaintiff fell below Board standards, he relied on complaints made personally to him outside of the hearing in addition to the letters introduced at the meeting and plaintiff's demeanor there. Davis was thus involved in the investigative process and considered matters outside the record. Furthermore, there is a dispute as to whether plaintiff was properly advised of the charges and of his rights. Under the circumstances the court may not now determine that David is immune.

The court need not decide whether an injunction may lie against David and the Board, except to note that the argument is incorrect that in the event of a decision in plaintiff's favor, the court may only direct A.C.J. to reinstate plaintiff. Plaintiff seeks

to enjoin the Board and David from further barring him from employment on Board routes without according him procedural due process.

IV

Defendants argue that because there are adequate state remedies available, plaintiff has no section 1983 claim. They point out that, although there was "no formal appeals process," plaintiff could have appealed David's decision through the Board of Education's system of appellate review, going as far as the State Commission of Education. Board of Education Bylaws, art. 7; N.Y. Educ. Law §310 (McKinney 1979). David claims that he informed plaintiff orally of the right to appeal. Instead of appealing, plaintiff asked for a hearing before his own union and then failed to appeal the arbitrator's decision.

Defendants rely on the Supreme Court decision in Parratt v. Taylor, 451 U.S. 527 (1981). That case concerned the negligent deprivation of a prisoner's property by the random and unauthorized act of a state official. The Court held that all the process due was provided by the state's tort claims procedure.

In a subsequent case the Supreme Court distinguished the facts of the Parratt case from the situation involving a deprivation of property as the result of some established state procedure, and noted that the Parratt case was not designed to reach the latter situation. Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982). See also Holmes v. Ward, 566 F. Supp. 863 (E.D.N.Y. 1983). Here, plaintiff challenges the Board's established procedure whereby it determines whether a driver's behavior meets

its standards. Plaintiff has raised genuine issues as to whether he was accorded constitutionally adequate procedural safeguards before being deprived of his livelihood. Whether or not he was properly informed of the right to appeal through the Board and whether or not that would have been sufficient to provide the process due plaintiff are two such issues.

The union grievance proceeding addressed A.C.J.'s decision to discharge plaintiff and could not have redressed the possible procedural infirmities of the Board's hearing.

V

Defendants claim that the doctrine of collateral estoppel bars plaintiff from relitigating the issues raised here because they were already fully litigated at the

Board hearing and at the arbitration proceeding.

Under the law of New York State, there are two requirements for the invocation of collateral estoppel. First, there must be an identity of issue, necessarily decided in the prior action and decisive of the present action. Second, there must have been a full and fair opportunity to contest the decision now claimed to be controlling. Langert v. Festa, 563 F. Supp. 692, 695 (E.D.N.Y. 1983). Federal law has essentially the same requirements. Id.

The court finds that the issue of denial of due process was not fully litigated nor decided in the prior proceedings. The Board was not a party to the arbitration proceeding, and the arbitration did not purport to decide whether plaintiff had received due process before the Board.

However, if defendants were to show that plaintiff received all the process due him at the arbitration proceeding, he would be estopped from contesting that he fell below the standard of "good moral character" set out in the contract between A.C.J. and the Board. In that event, plaintiff would be entitled only to nominal damages for the Board's denial of due process.

VI

DiDomenico argues that the state libel claim against him should be dismissed. The claim is based on the April 3, 1982 letter DiDomenico wrote, at the request of the Bureau, documenting the complaints made about plaintiff.

Under New York State law, absolute immunity applies only to proceedings in court or before an officer with attributes similar to a court. Toker v. Pollak, 44 N.Y.2d 211,

219 (1978). As discussed above, taking the plaintiff's presentation of facts as true, the Board's proceedings were not functionally comparable to judicial proceedings so as to provide its participants with absolute immunity.

DiDomenico's communication, however, is entitled to a qualified privilege. That privilege arises "whenever a person makes a bona fide communication upon a subject in which he has a legal, moral or social duty to speak and the communication is made to a person having a corresponding interest or duty." Kilcoin v. Wolansky, 75 A.D.2d 1, 428 N.Y.S.2d 272 (2d Dep't 1980). Plaintiff does not dispute the existence of the privilege. He claims DiDomenico's statement was motivated by malice. Plaintiff alleges that DiDomenico had no personal knowledge of the complaints and that three of the

complaining matrons did not work for A.C.J. during 1982. Plaintiff also says that there was an ongoing dispute regarding overtime pay between himself and DiDomenico, who accused plaintiff of "stealing time." Plaintiff is entitled to try and prove personal spite on DiDomenico's part.

VIII

In determining whether plaintiff was or was not denied procedural due process the court must take into account the seriousness of the charges against plaintiff and the fact that defendants had a heavy responsibility to provide for the welfare of the children and matrons with whom plaintiff was in daily contact. Mathews v. Eldridge, 424 U.S. 319 (1976). But an individual faced with loss of property is entitled to such procedural safeguards as are due him.

There are too many disputed issues of fact--most importantly, the issues of what process was actually afforded plaintiff and whether those measures in fact provided the process he was due--to permit a final determination now.

Plaintiff has not shown as a matter of law that he was denied due process.

The motions for summary judgment are denied. So ordered.

Dated: Brooklyn, New York
March 19, 1984

Eugene H. Nickerson, U.S.D.J.

APPENDIX C

Special Interrogatories Given to the Jury in the District Court, Stein v. Board of Education, et al.

(A)

QUESTIONS FOR THE JURY

1. Did plaintiff show by a preponderance of the evidence that he did not receive adequate notice of the charges against him sufficient to enable him to prepare to respond to them?

X Yes _____ No

2. Did plaintiff show by a preponderance of the evidence that at the hearing of April 12, 1982 plaintiff did not receive an explanation of the evidence against him or an opportunity to state, either orally or in writing, his reasons why the action should not be taken against him?

_____ Yes X No

Answer question 3 only if you have answered either question 1 or question 2 "yes."

3. Did plaintiff show by a preponderance of the evidence that defendants ACJ Transporation Corp. and DiDomenico conspired with a person or persons at the Board of Education or both to deprive plaintiff of his right to adequate notice or an adequate hearing (as the court has defined those terms)?

_____ Yes _____ No

4. Did plaintiff show by a preponderance of the evidence that defendant DiDomenico in making the statements in the letter of April 3, 1982 was motivated by personal malice or ill will toward plaintiff, or knew that the statements were false, or made the statements with reckless disregard for whether they were true or false?

_____ Yes __X__ No

5. Did defendants show by a preponderance of the evidence that all the statements in the letter of April 3, 1982 were true?

_____ Yes __X__ No Truth = substance or verbatim ?

(B)

QUESTIONS FOR THE JURY

1. What total amount of damages did plaintiff sustain for lost wages?

$ 15,000

2. What total amount of damages did plaintiff sustain for the mental and emotional distress that he suffered as a result of not receiving adequate notice?

$ 0

APPENDIX D

Relevant Portion of Petitioners' Proposed Jury Instruction in the District Court *Stein v. Board of Education, et al.*

Proximate Cause of Injury

30. The fourth and final element that the plaintiff must establish against defendants, by a preponderance of the evidence, is that the defendants actions and conduct were the proximate cause of the injury and consequent damage to plaintiff. [See Devitt and Blackmar F.P.J.I. §92.05.] An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and

that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission. [See Devitt and Blackmar F.P.J.I. §80.18.]

Plaintiff's Burden

31. In order for the plaintiff to prevail in his claim for damages against the defendants he must establish, by a preponderance of the evidence, as defined in par. 13, each one of the four necessary elements I have described. If plaintiff fails to satisfy you of even one part of these elements, then plaintiff's claim must fail. If that is the case, you must render a verdict in favor of the defendants.

THE CIVIL RIGHTS CLAIMS AGAINST THE BOARD

32. Plaintiff has also asserted a claim, under Title 42 U.S.C.A. §1983, against the Board of Education of the City of New York. A governmental entity, such as the Board, cannot be held liable for the actions of its employees, under a civil rights claim, unless their actions can be said to fairly represent an official policy or custom of that governmental entity Monell v. New York City Deaprtment of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed. 2d 611 (1978). Therefore, in order for plaintiff to prevail on his claim against the Board he must show you, by a preponderance of the evidence, that the actions of the defendants were in furtherance of an unconstitutional or unlawful official policy or custom of the Board. Isolated incidents of negligence or misbehavior of its employees do not make a government policy. Secondly, the plaintiff must show, by a preponderance of the evidence, that such a policy or custom was the "moving force" behind any violation of the plaintiff's rights, Dominguez v. Beame, 603 F.2d 337 (2d Cir. 1979), cert. denied, 446 U.S. 417, 100 S. Ct. 1850, L. Ed. 2d (1980).

33. The word policy implies a course of action consciously chosen for among various alternatives. Proof of a single incident of unconstitutional activity is not sufficient to impose liability upon the Board. City of Oklahoma City v. Tuttle, ____ U.S.____ (6/3/85).

DAMAGES UNDER THE CIVIL RIGHTS CLAIMS

34. My charge on the law of damages must not be taken as an indication that you should find for the plaintiff in this action. You are to decide whether the plaintiff should prevail, entitling him to damages, based upon a preponderance of the evidence presented and the rules of law I have just instructed you on. If you find for the defendants, you do not need to consider the issue of damages. Only in the event that you find for the plaintiff, as against the defendants, must you consider the issue of damages.

35. The law of damages in a federal civil rights suit is governed by the principle of reasonable compensation. If you should find that the plaintiff is entitled to a verdict, you may award him only such damages as will reasonably compensate him for such injury and damage as you find, from a preponderance of the evidence, that he has sustained as a proximate result of the incident. To award compensatory damages without a showing of actual injury, by a preponderance of the evidence, would amount to a windfall for the plaintiff. The only damages which you may award, absent a showing of actual injury by a preponderance of the evidence, are nominal damages, not to exceed one dollar. Carey v. Piphus, 435 U.S. 247, 98 St. Ct. 1042, 55 L.Ed. 2d 252 (1978).

No Speculative Damages

36. You are not permitted to award speculative damages. So, you are not to include, in any verdict, compensation for any propsective loss which, although possible, is not reasonably certain to occur in the future. [See Devitt and Blackmar F.P.J.I. §85.08.]

Damages Must Be Proximately Caused

37. You are not to award damages for any injury or condition from which the plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence, that such injury or condition was proximately caused by the acts complained of. [See Devitt and Blackmar F.P.J.I. §85.09.]

Damages - Loss of Earnings

38. If you should find that plaintiff is entitled to a verdict, then in arriving at the amount of the award you may include: the reasonable value of the time, if any, shown by the evidence in the case to have been necessarily lost up to date by the plaintiff since the injury, because of being unable to pursue his occupation, as a proximate result of the injury. In determining this amount, you should consider any evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned during the time so lost, had he not been disabled. [See Devitt and Blackmar F.P.J.I. §85.04.]

Damages - Punitive

39. In addition to damages compensating plaintiff for his injuries, you may, but are not required to, allow plaintiff punitive damages against

APPENDIX E

Relevant Portion of Colloquy in District Court Regarding Jury Instructions, Stein v. Board of Education, et al.

making --

THE COURT: Excuse me, I meant Board of Education instead of city.

MS. JONAS: Your Honor, it was also said with damages you would charge proximate cause. I don't see that definition.

THE COURT: I suppose I should do that. I say directly caused. I think that should be proximately of caused.

MS. JONAS: Defendant also asks for charge that they may not award speculative damages.

THE COURT: I say that, mere speculation. You see that about eight or nine or ten lines from the bottom?

MS. JONAS: Yes, your Honor.

THE COURT: Do you have anything further?

MS. JONAS: Yes, your Honor.

THE COURT: Tell us?

MS. JONAS: I would ask a charge or nominal damages, the fact if they find that the board had just cause to fire him only nominal damages be awarded. I refer the case Papadakis v. Bresenoff which follows Carey v. Piphus, held in a similar situation that at most at

this stage this Court can only order a new hearing; that if the new hearing finds in fact there was just cause or if the jury, I suppose, in fact it was just cause only nominal damages would be awarded. That was recently affirmed by the Second Circuit.

THE COURT: I focused on that precise question because you raised it before. I don't think that's right in this context. I read both cases. It's true that if the circumstances are such that in the case itself he's gotten due process; that is, say, if he had the notice prior to the hearing so -- prior to his hearing before Mr. David -- so that he was equipped to present his case and they didn't for one reason or another, notice hadn't been given before but at the time he got to the hearing he had had adequate notice, he was able to defend himself, it's true if they found he was dischargeable, then you would only get nominal damages.

However, in this instance it seems to me he wasn't given notice -- the jury found he wasn't given adequate notice to enable himself to prepare himself; therefore, he wasn't equipped at that point to bring to bear all of the considerations

which could have entered into Mr. David's head at the time of the hearing. I can't say and no one can say at this point -- even Mr. David I don't think would have been competent for him to say it wouldn't have made any difference whether, for example, he showed Maxine Brown was lying; that none of these others actually happened; that incident with respect to Ms. Richburg was misstated to the extent she didn't leave because of this accident but because of other reasons and her attitude to them.

So, we can't say as we sit here now, addressing the first point of whether the jury could find that which is what you're asking me to charge, we can't say whether when it goes back to the hearing or not, when it goes back for a new hearing, we can't say as a matter of law whether or not the city will decide that he should be decertified Until that happens he's entitled to be certified. If he's entitled to be certified he's entitled to have his job.

MS. JONAS: Yes, he may be entitled to be certified, but not entitled to damages.

THE COURT: I don't understand why not. Why not? Maybe you can explain it to me.

MS. JONAS: Take a look at this decision, in this case no hearing was given whatsoever to an affiliate of a city agency. The Court found that a hearing --

THE COURT: You want me to read the case?

MS. JONAS: Yes.

THE COURT: Certainly.

MS. JONAS: No damages could be awarded --

THE COURT: I'll read the case. I read a lot of cases Friday when you were all resting.

(Pause).

THE COURT: This is exactly the point I was making; that is, where there's a due process hearing which he finds that there was, a due process hearing a couple of months after, just about three months, then where he's afforded a due process hearing which results in the termination of his employment then, of course, there would only be nominal damages, but that's not what happened here.

The due process hearing wasn't -- accomplished here because he didn't have time to prepare himself or the notice to prepare him. I

agree with this case. As it's stated here, that's what Carey v. Piphus was. That's not this case.

MS. JONAS: If I may, in this case, Papadakis, he didn't hold a hearing until the judge made a finding. I think it was the judge, though it's unclear judge or jury, after a trial that he was entitled to due process and remanded the case back to the agency to give him the hearing which I think is the status we're at here.

THE COURT: Maybe they left out that month where he would have been or a couple of months.

To the extent this is inconsistent with what I'm holding I don't agree with it. I don't think it's inconsistent.

MS. JONAS: Your Honor, it was affirmed by the Appellate Court.

THE COURT: You know, the Court of Appeals will focus on it for you if you think it worthwhile, depending upon what the damages are.

MS. JONAS: Of course I'll take exception.

THE COURT: Pardon?

MS. JONAS: I'll take exception.

THE COURT: You don't need to. You just

APPENDIX F

Relevant Portion of Jury Instructions from Trial Transcript in the District Court Stein v. Board of Education, et al.

THE COURT: Members of the jury, since you found plaintiff didn't get adequate notice of the charges against him you will now consider the the question of damages that plaintiff is entitled to receive from the defendants, the Board of Education and Mr. David.

Compensatory damages are such as to reimburse a person for actual losses proximately caused by the defendants' acts found to be wrongful.

What does proximate cause mean? The plaintiff, as you know, has the burden of proving by a preponderance of the evidence that the defendants' wrong was the proximate cause of the plaintiff's damages. Damages proximately caused by an act, if the act played a substantial part in bringing about an actual -- or actually causing the damage.

This compensatory rule is used to attempted to put the injured party back in the same position as he would have been had the wrongful conduct never occurred. The burden is on the plaintiff to prove these matters by a preponderance of the evidence. His damages can include both the wages he has lost to date because he's never received adequate notice and also compensation for mental and emotional distress that he suffered as a result of not receiving adequate notice of the charges against him.

Plaintiff had a duty, has a duty, to mitigate his damages by seeking other sources of

income and employment during the period from his discharge until the date of the trial. You must deduct, therefore, the amounts, if any, that you find plaintiff actually earned from other employment from the time of his discharge until the time of the trial date, the amount that he received from unemployment insurance and the amount that he could have earned during that period by the exercise of reasonable diligence in similar employment during that period.

Defendant has the burden, by the way, of proving the amount of that deduction for the amount he could have earned by the exercise of reasonable diligence.

The placing of a dollar value on someone else's mental or emotional distress is a difficult task. You just have to use your best judgment. Proof of these questions is necessarily difficult and subjective, but mere speculation and conjecture is not sufficient for you to award damages of this type. The plaintiff is entitled to recover only -- only -- for that pain and suffering that were caused by not receiving adequate notice of the charges against him. He's not entitled to recover for any mental and emotional distress that may have

resulted from the nature of the charges that were made against him or from the fact that he lost his job. There's a distinction there. It's only the lack of notice and the feelings that he had with respect to that that you can consider, but not the feelings that he may have had because of what was said about him or what his family thought about those charges, his embarrassment because of the nature of the charges. He's not entitled, in other words, for any damages for any distress or humiliation that he may have experienced because he felt the charges made against him were untrue, that they disgraced him. That's not a part of your calculation of damages.

Since I want you to break these damages down into two questions, one, what total amount of damages did plaintiff sustain for lost wages in accordance with how it was instructed and two, what total amount of damages did plaintiff sustain for the mental and emotional distress that he suffered as a result of not receiving adequate notice?

Remember, when you reached -- by the way, all the rest of my instructions about witnesses and all that you heard before you went back to deliberate on liability, all of those

apply.

When you reach a verdict just send me a note saying you reached a verdict. You have to be unanimous in that note. You should -- this is a dollar amount to fill in in each instance.

The marshal has already been sworn. We'll send the exhibits in to you to the extent they are relevant that you can consider them, as well as all the testimony.

Would you retire then, commence your deliberations on this? I'll give you, Mr. Foreperson, this set of questions.

(jury leaves courtroom).

Please give the exhibits to the marshal. I don't know if they have their pencils /SEULS and papers in there.

We'll take back these questions. They are not part of the evidence on liability.

(Said documents handed to the marshal).

THE COURT: (Continuing) I hope we have a verdict before lunch.

I'm going to take on another case if you would like to clear away from the table.

(Jury deliberating).

Time noted 11:20 a.m.